

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

SCG LAURELLWOOD LLC, d/b/a  
LAURELLWOOD NURSING CENTER<sup>1</sup>

Employer

and

Case 12-RC-9397

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 1625

Petitioner

**DECISION AND DIRECTION OF ELECTION**

SCG Laurellwood LLC, d/b/a Laurellwood Nursing Center (the Employer) operates a nursing home in St. Petersburg, Florida.<sup>2</sup> The Petitioner, the United Food and Commercial Workers International Union, Local 1625 (the Union), seeks to represent a unit composed of the Employer's full-time and regular part-time certified nursing assistants (CNAs), restorative aides, central supply clerks, and the CNA/activity assistant.<sup>3</sup> The Employer contends in its brief that an appropriate unit must be a "wall-to-wall unit of all nonprofessional employees,"

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The parties stipulated that the Employer is a Florida corporation operating a nursing home located at 3127 57<sup>th</sup> Avenue North, St. Petersburg, Florida, and that during the past 12 months, it has derived gross revenues exceeding \$100,000, and has purchased and received at its St. Petersburg facility goods valued in excess of \$50,000 directly from points located outside the State of Florida.

<sup>3</sup> The record includes a job roster prepared by the Employer. According to the roster, the job title of the restorative aide is "CNA restorative aide," and the job title of the central supply clerk is "CNA/central supply clerk. Although the Union did not expressly state its desire to include the CNA/activity assistant, the record reflects that the Union seeks to include all CNAs, and it appears from the record that the Union seeks to include the CNA/activity assistant. This is supported by the parties' agreement at the hearing that there are 34 CNAs; without the CNA/activity assistant, there would only be 33 CNAs. .

thus also including all full-time and regular part-time licensed practical nurses (LPNs),<sup>4</sup> and both activity assistants. The unit sought by the Union has approximately 34 employees,<sup>5</sup> while the unit proposed by the Employer adds 11 LPNs<sup>6</sup> and one activity assistant.

A hearing officer of the Board conducted a hearing, and both parties submitted briefs. I have considered the evidence and arguments presented by the parties.<sup>7</sup> As explained below, I conclude that the unit sought by the Union comprises an appropriate unit within the meaning of Section 9(b) of the Act, with the modification that the employee holding the position of “activity assistant” may vote subject to challenge.

After setting forth a brief overview of the Employer’s facility and supervisory structure, I will summarize the relevant facts regarding the positions at issue, and then apply the controlling Board principles.

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<sup>4</sup> The Union seeks to include CNAs referred to by the Employer as “pool” CNAs. The Employer does not dispute their inclusion, but contends that an appropriate unit must also include pool LPNs. Pool CNAs and LPNs are discussed in the body of my Decision.

<sup>5</sup> This includes the pool CNAs, as well as the central supply clerk and the restorative aide, each of whom is also a CNA, and a CNA who also works as an activity assistant.

<sup>6</sup> This includes the pool LPNs.

<sup>7</sup> In its brief at pp. 2-3, the Employer asserts that the Union seeks to include maintenance employees. Although the Union initially included maintenance employees in its petition, the record reflects that the Union amended this aspect of its petition at the hearing, and Board Exhibit 2, a Stipulation signed by the parties, clearly states that maintenance employees are excluded. The Stipulation lists the positions to be excluded as: “all other employees, registered nurses, maintenance employees, office clerical employees, guards, and supervisors as defined in the Act.” Also in its brief, at p. 3, the Employer asserts that the Union seeks to include the activity assistant. It appears from the record that the Union seeks to only include the position that the Employer titles, “CNA/activity assistant,” and not also the position that the Employer titles, “activity assistant.” However, the record is not clear on this point, and as explained below, I conclude that the “activity assistant” may vote subject to challenge.

## 1. FACTS

### *Overview*

The Employer's facility has 51 beds divided into two units. One unit, with approximately 22-23 beds, is referred to as the "rehab unit." This unit provides physical, speech and occupational therapy for residents who are generally at the facility on a short-term basis. The other unit has 28 beds and provides long-term care for residents. Each unit has a nurses station. Medications for residents in both units are stored in a room behind one of the nurses stations. There is one kitchen and dining room for all residents.<sup>8</sup> The facility operates in three shifts: 7:00 a.m. until 3:00 p.m. (the day shift), 3:00 p.m. until 11:00 p.m. (the evening shift), and 11:00 p.m. until 7:00 a.m. (the night shift). The Employer considers as "full-time" any employee working 32 hours per week or more.

The Director of Nursing has supervisory authority over the nursing department, including the unit manager.<sup>9</sup> The Director of Nursing testified that the LPNs and CNAs report to the unit manager and to her.<sup>10</sup> The Director of Nursing further testified that there is one registered nurse on duty for each

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<sup>8</sup> The Union in its brief states that the Employer subcontracts all dietary, housekeeping, and laundry positions. The record reflects that the Employer has a dietary department, but the record does not reflect whether dietary employees work for the Employer or a subcontractor.

<sup>9</sup> There is just one unit manager, who supervises both units.

<sup>10</sup> At the hearing, the parties stipulated, and I find based upon the record as a whole, that the following positions are excluded because they exercise supervisory authority within the meaning of Section 2(11) of the Act: Administrator Jacque Shirley; Director of Nursing Veronica Spears; Director of Activities Beverly James; Director of Social Services Jeremiah Mincey; Director of Maintenance (position currently vacant); Human Resources Payroll Manager Marilyn Johnson; Unit Manager Teresa Worthington; and Staffing Coordinator and Admissions Coordinator Levika Garcia. The parties also stipulated, and I find based upon the record as a whole, that the medical records secretary and MDS coordinator, Linda Long, is excluded as an office clerical employee.

evening shift, and one registered nurse on duty for the day shift on weekends.

The parties agree that RNs are excluded from the unit.<sup>11</sup>

### ***Job Duties and Contact of CNAs and LPNs***

The Director of Nursing testified that CNAs<sup>12</sup> provide direct care for residents, such as bathing, dressing, grooming, and toileting. They assist residents with eating and transfer residents who are not ambulatory from bed to chair, toilet, dining room, and any activities. CNAs also accompany residents to doctor appointments outside the facility.

According to the Employer's position description for certified nursing assistant, the "essential functions" of a CNA begin with a list of duties under the heading, "[a]ssists with resident/patient care needs and comforts..." The listed duties include: "assists with bathing functions and dressing/undressing as necessary;" "keeps residents/patients dry when [they] become soiled or wet;" "assists with nail care, shaving, and hair care;" "assists with lifting, turning, positioning, and transporting residents;" "makes both occupied and unoccupied beds;" "assists resident/patient with bowel and bladder functions;" and "answers call lights promptly."<sup>13</sup>

The CNAs' "essential functions" also include a list entitled, "[a]ssists with nursing functions..." The listed duties include: "measures and records vital

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<sup>11</sup> It appears from the record that the evening shift RN and the weekend night shift RN exercise supervisory authority over LPNs and CNAs. However, the parties did not specifically address this issue.

<sup>12</sup> As noted above, all of the employees the Union seeks to represent are CNAs, although some have additional job titles as well.

<sup>13</sup> The Director of Nursing testified that "everyone" is responsible for answering call bells, that whoever is closest to the room where the call bell rings is supposed to respond, and that if the resident requires toileting or assistance that only nursing personnel can provide, both CNAs and LPNs respond.

signs;” “weighs and measures residents/patients;” “collects specimens (i.e., urine, stool, sputum);” “turns bedfast residents/patients at least every 2 hours;” “maintains accurate records of hydration and nutrition offerings on residents identified at risk for malnutrition/ dehydration.” The CNAs’ “essential functions” further include a list under the heading, “[p]erforms food service functions...” The listed duties include: “prepares residents/patients for meals (i.e. take to bathroom, wash hands, oral care, take to, from dining room, etc.);” “serves food trays;” “serves between meal and bedtime snacks;” “performs after meal care (i.e., clean residents/patients hands, face, clothing, brush teeth, take to bathroom, etc.);” and “records the resident’s/patient’s food and fluid intake on meal consumption record.”

The record includes a one-page document entitled: “C.N.A. Expectations.” Listed expectations include walking rounds at shift change,<sup>14</sup> making sure male residents are shaved daily on the day shift, making residents’ beds by 10:30 a.m., keeping residents’ finger nails clean and filed, making sure mouth care is done upon rising, after meals, and at bed time, ensuring that ADL (Activities of Daily Living) books are 100 per cent completed before leaving the facility,<sup>15</sup> ensuring that residents sit in assigned seats at meals, and keeping bed pans clean.

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<sup>14</sup> The Director of Nursing testified that this involves walking from bed to bed with the CNA coming on duty who is assigned to those beds, and reporting on each resident’s condition, and any required changes in care, etc.

<sup>15</sup> The Director of Nursing testified that CNAs use ADL sheets to document any assistance provided to the resident in dressing and grooming, bowel habits, food and fluid intake, etc.

There are no minimum educational requirements for the CNA, except that she must be certified by the State of Florida, which requires completing a 32-hour class and passing an exam.<sup>16</sup> CNAs are paid hourly, starting at \$10 per hour.

The Director of Nursing testified that LPNs administer medications,<sup>17</sup> provide treatment,<sup>18</sup> receive and transcribe physician orders to patient charts, chart nurses' notes to reflect the care provided and the resident's response, give nursing reports to relief LPNs at shift change,<sup>19</sup> and assure that charges are accounted for on all chargeable items.

According to the Employer's position description, the essential functions of the LPN also include making frequent rounds to monitor the residents' conditions, providing direct resident care, recording and reporting to the appropriate person any symptoms, reactions, and changes in the resident's condition, reviewing care plans daily to ensure that appropriate care is given, keeping the physician informed of the resident's condition,<sup>20</sup> following locked medication room<sup>21</sup> and medication cart policies and procedures, and participating in Interdisciplinary Plan of Care (IPOC) meetings as requested.<sup>22</sup>

The LPN must be a high school graduate. In addition, the LPN must be licensed by the State of Florida, for which the LPN must complete a one-year

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<sup>16</sup> The certification must be current.

<sup>17</sup> The Director of Nursing testified that day shift LPNs administer medications at 9:00 a.m., noon, and 2:00 p.m., and that evening and night shift LPNs also administer medications, with most of the night shift medications given at 5:00 a.m.

<sup>18</sup> This includes treating wounds and respiratory treatment.

<sup>19</sup> The Director of Nursing testified that the report procedure for LPNs is similar to that for CNAs, and that the two procedures occur separately.

<sup>20</sup> It appears from the record that CNAs do not have direct communication with doctors.

<sup>21</sup> LPNs have access to the room where medications are stored. CNAs do not.

<sup>22</sup> The Director of Nursing acknowledged that CNAs do not measure drug dosages, administer medication, provide respiratory treatment, receive and transcribe physician orders, chart nurses notes, or assure that charges are accounted for on chargeable items.

course of study and pass an exam. LPNs must also have current CPR certification. LPNs must have experience in giving medications effectively and efficiently during federally mandated time frames. LPNs are paid hourly, starting at \$18 per hour.

The Director of Nursing testified that LPNs and CNAs are in constant contact throughout their shift, and that LPNs assist CNAs several times per day with feeding,<sup>23</sup> transferring, dressing, bathing, and toileting residents. She further testified that CNAs occasionally assist LPNs as by positioning a resident while the LPN dresses a wound.

The Director of Nursing also testified that at the beginning of each shift, the LPN and the CNA confer with one another after receiving report on their assigned residents to discuss any special needs a resident may have.<sup>24</sup> However, she acknowledged that CNAs going off duty report to CNAs coming on duty, and similarly for LPNs.<sup>25</sup>

The Director of Nursing testified further that CNAs complete ADL sheets toward the end of their shift at the nurses station, and that LPNs do their charting at the nurses station as well.<sup>26</sup>

The record does not reflect what duties, other than those of a CNA, are performed by the CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant.

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<sup>23</sup> For example, when CNAs are busy assisting residents who eat in the dining room, LPNs assist in feeding residents who cannot leave their rooms.

<sup>24</sup> For example, if a resident ran a fever on the preceding shift, the LPN coming on duty would instruct the CNA coming on duty to take that resident's vital signs periodically.

<sup>25</sup> For example, the LPN going off duty would report to the LPN coming on duty that a resident's doctor had been called about a change in the resident's condition, and report what the doctor said.

<sup>26</sup> The record does not reflect whether LPNs do so at the end of their shift.

### ***Staffing and Interchange***

The Director of Nursing testified that, in general, the Employer uses two LPNs and five to six CNAs on the day shift,<sup>27</sup> one LPN, one RN, and four to five CNAs on the evening shift,<sup>28</sup> and two LPNs and three to four CNAs on the night shift. On weekends, the Employer generally uses two LPNs, three to four CNAs, and one RN per shift.<sup>29</sup>

The Staffing Coordinator prepares “Daily Staffing Projection/Assignment Sheets” (staffing sheets), which list LPNs and CNAs on duty for a given shift. The Director of Nursing and the unit manager then determine the beds to be assigned to each LPN and CNA on the basis of the census, or number of occupied beds. The Employer divides the number of occupied beds by the number of CNAs to determine how many beds to assign to each CNA. The group of beds assigned to a CNA is referred to as a “set.” It appears from the record that CNA assignments are determined solely by the census, rather than the particular acuity of the resident.<sup>30</sup>

If a CNA is on leave or calls off sick, the Employer seeks to replace her from a pool of CNAs who work as needed. It appears from the record that the same procedure is followed when an LPN calls off. The Director of Nursing testified that pool CNAs and pool LPNs are compensated on a per diem basis. They receive \$2 per hour more than the regular rate for the position (i.e. \$12 per

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<sup>27</sup> One LPN is assigned to each unit.

<sup>28</sup> On weekdays, this RN is assigned to the rehab unit.

<sup>29</sup> The weekend RN only works during the day and evening shifts.

<sup>30</sup> Each CNA is assigned to one set on each shift. The number of residents in her set depends upon the census. CNAs rotate from one set to the next, although the record does not reflect how frequently they rotate between sets.



hour to start for per diem CNAs and \$20 per hour to start for per diem LPNs).

Pool employees do not receive benefits.<sup>31</sup>

The Employer is required to provide one LPN for 40 occupied beds.<sup>32</sup> When the census falls below 40, if two LPNs have been scheduled, the Director of Nursing occasionally assigns the second LPN to perform the duties of a CNA. An LPN assigned to CNA duties does not administer medications or perform other LPN functions, such as wound treatment; her LPN duties are instead performed by the other LPN.<sup>33</sup> The Director of Nursing testified that about once every two weeks, an LPN on the night shift performs CNA duties because the census falls below 40. The Director of Nursing further testified that an LPN is assigned CNA duties when a CNA calls in sick and the Employer is unable to procure a substitute from its pool of CNAs. The Director of Nursing testified that this occurs about twice a month, mainly on weekends. CNAs cannot substitute for LPNs.

The record contains the staffing sheets for eight days from November 18, 2009, to January 12, 2010. Each of these eight staffing sheets shows that an LPN worked as a CNA on the night shift, and that the census was 40 or less.<sup>34</sup> The number of hours that the LPN worked as a CNA varies from three and one-quarter to eight. These staffing sheets also reflect that four different LPNs worked as CNAs on these eight nights.<sup>35</sup>

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<sup>31</sup> Both parties agree that the eligibility of pool employees should be determined pursuant to Sisters of Mercy Health Corp., 298 NLRB 483 (1990) (employees who average four hours or more per week during the calendar quarter preceding the eligibility date).

<sup>32</sup> Thus, when the census reaches 41, the Employer must have two LPNs per shift.

<sup>33</sup> It appears from the record that when performing CNA duties, LPNs are paid their normal rate.

<sup>34</sup> On one night shift, a CNA called off sick.

<sup>35</sup> The four LPNs were: E. Garcia, K. Greene, E. Cannedy, and D. Devine.

Additionally, the Director of Nursing testified that “quite often,” the Employer’s CNAs have become LPNs using the Employer’s tuition assistance program. The record does not reflect further information about the frequency of such promotions.

The record does not reflect any occasions when an LPN has performed as a CNA restorative aide, CNA/central supply clerk, or CNA/activity assistant.

CNAs are not used as substitutes for absent LPNs.

### ***Additional Terms and Conditions***

LPNs and CNAs use the same time clock, break room,<sup>36</sup> and bulletin board. They must provide and wear scrubs, although the Employer does not require any particular color.<sup>37</sup> LPNs and CNAs have separate ID badges.

All employees are governed by the Employer’s Handbook. As set forth in the Handbook, all employees are subject to the same driver’s license background check and fingerprinting policy, and all serve a 90-day probation. All employees receive annual evaluations on their anniversary dates, and these evaluations determine raises.<sup>38</sup> All employees are subject to the same disciplinary policy, including the attendance policy. All employees are eligible for the Employer’s medical, dental, and vision insurance, and 401(k) plan, as well as the same life and disability insurance. All employees receive the same paid time off. All

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<sup>36</sup> Employees receive a 30-minute meal break. It appears from the record that day shift employees also receive a 15-minute break in the morning and afternoon. The record does not reflect whether evening and night shift employees receive 15-minute breaks.

<sup>37</sup> Employees are responsible for supplying and maintaining their own scrubs.

<sup>38</sup> The Director of Nursing and the unit manager evaluate each LPN and CNA on their anniversary date, with input from other “staff” although the record does not reflect who the other staff is.

employees must attend the same in-service training programs on topics such as patient abuse.

## 2. ANALYSIS

### *The Appropriate Analytical Framework*

In Park Manor Care Center,<sup>39</sup> the Board ruled that the proper test for determining the appropriateness of bargaining units in non-acute health care institutions, such as nursing homes, is an “empirical community of interest test.” Under that test, the Board considers traditional community of interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900 (Sept. 1, 1988), reprinted at 284 NLRB 1528, and Final Rule, 54 Fed. Reg. 16336 (April 21, 1989), reprinted at 284 NLRB 1580. The Board further considered the evidence presented during rulemaking with respect to units in acute care hospitals, and prior cases involving either the type of unit sought or the type of health care facility in dispute. In remanding Park Manor to the Regional Director, the Board observed that if the employees excluded by the Regional Director could not themselves constitute a separate unit, they must perforce be included in the broader unit.<sup>40</sup>

The Board further explained in Park Manor<sup>41</sup> that finding a position to be technical (as the Board has traditionally found LPNs<sup>42</sup>) does not automatically lead to its exclusion from the broader unit, or to finding appropriate a separate

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<sup>39</sup> 305 NLRB 872 (1991).

<sup>40</sup> 305 NLRB at 875 fn 18.

<sup>41</sup> 305 NLRB at 876.

<sup>42</sup> See e.g., Pine Manor Nursing Home, 238 NLRB 1654, 1656 (1978).

technical unit. Rather, whether or not technical employees may constitute a separate appropriate unit depends on their relationship to other nonprofessional employees.<sup>43</sup>

In rulemaking, without deciding the appropriate units for such facilities, the Board observed that in nursing homes, “there is less diversity among professional, technical and service employees”, and the staff as a whole is more integrated than in acute care hospitals. The Board further noted that, generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities than that provided in acute care hospitals, and thus receive lower wages, and that there is a greater overlap of functions in nursing homes among nonprofessionals than there is in acute care hospitals.<sup>44</sup>

In evaluating whether positions share a community of interest, the Board considers common supervision; similarity in employees’ skills and functions; similarity in the scale and manner of determining earnings; similarity in benefits and working conditions; contact among employees; degree of functional integration; interchange; geographical proximity; and the history of any collective bargaining involving the parties. See Turner Industries Group, LLC., 349 NLRB 428, 430 (2007); Kalamazoo Paper Box Co., 136 NLRB 134, 137 (1962).

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<sup>43</sup> Hillhaven Convalescent Center, 318 NLRB 1017, 1017 (1995).

<sup>44</sup> See 53 Fed. Reg. 33927-33928, reprinted at 284 NLRB at 1567, as discussed in Hillhaven Convalescent Center, 318 NLRB at 1018.

The unit sought in the petition need not be the most appropriate unit, as long as it is an appropriate unit.<sup>45</sup> Thus, the Board looks first at the petitioned-for unit to see whether it is “an appropriate unit.”<sup>46</sup>

***CNAs, Including the CNA Restorative Aide, CNA/ Central Supply Clerk, and CNA/ Activity Assistant, Comprise an Appropriate Unit Without LPNs***

While the LPNs and CNAs at the Employer’s facility share some community of interest factors, such as common supervision,<sup>47</sup> frequent work-related contact, and similar working conditions, and although LPNs occasionally perform some of the same functions as CNAs, I find that these factors are outweighed by factors establishing that CNAs, restorative aides, and central supply clerks comprise an appropriate unit. I further find that a unit consisting solely of LPNs would comprise an appropriate unit under Park Manor.<sup>48</sup>

To begin with, LPNs must be high school graduates, and must be licensed in the State of Florida, for which they must complete a one-year course of study and pass an exam. LPNs also must possess current CPR certification. CNAs are not licensed, do not have to be certified in CPR, and are not required to have graduated from high school. The Board has found that LPNs’ specialized skills

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<sup>45</sup> Dezcon, Inc., 295 NLRB 109, 111 (1989); see also P.J. Dick Contracting Inc., 290 NLRB 150 (1988).

<sup>46</sup> Dezcon, Inc., *supra* at 111.

<sup>47</sup> The unit manager and Director of Nursing supervise all nursing department staff.

<sup>48</sup> See Hillhaven Convalescent Center, 318 NLRB 1017 (finding appropriate a unit of nonprofessional employees, excluding LPNs, despite some community of interest factors weighing against their exclusion); Lincoln Park Nursing Home, 318 NLRB 1160 (1995) (same). See also, Cogburn Healthcare Center, 335 NLRB 1397, 1423 (2001) (finding appropriate a unit of nursing home CNAs and other nonprofessionals, excluding LPNs, for purposes of awarding a Gissel bargaining order).

and licensing requirements support excluding them from a unit of nonprofessionals.<sup>49</sup>

Because of their specialized skills and licensing, LPNs perform significant patient care duties that CNAs are not permitted to perform. These include administering medications,<sup>50</sup> providing respiratory treatment, treating wounds, transcribing physician orders to residents' charts, charting residents' medications, reviewing care plans daily to ensure that appropriate care is given and keeping physicians informed as to residents' conditions. In addition, LPNs have access to the medical supply room, while CNAs do not.<sup>51</sup> The Board has relied on similar factors in finding appropriate a unit of nonprofessionals excluding LPNs.<sup>52</sup>

The fact that CNAs, unlike LPNs, document Activities of Daily Living underscores that their focus is on the resident's daily routines, while the fact that LPNs chart nurses' notes shows that they focus on the resident's medical condition. The CNA is required to perform functions such as making beds, providing snacks, assisting with nail care, shaving, and hair care, and making sure mouth care is done upon rising, after meals, and at bed time. The evidence does not establish that LPNs routinely perform such duties.

The differences between the primary responsibilities of the LPN and CNA are further demonstrated by the Director of Nursing's testimony that on occasion,

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<sup>49</sup> Hillhaven Convalescent Hospital, 318 NLRB at 1018; Lincoln Park Nursing Home, 318 NLRB at 1161-1162.

<sup>50</sup> LPNs must have experience giving medications effectively and efficiently during federally mandated time frames.

<sup>51</sup> See, Madeira Nursing Center, 203 NLRB 323 (1973) (pre-rulemaking case finding the LPNs have separate community of interest apart from nurse aides based on educational requirements of LPNs and duties such as administering medication, charting residents' conditions, communicating with physicians, and maintaining control over drug supplies).

<sup>52</sup> Hillhaven Convalescent Hospital, 318 NLRB at 1018.

she has assigned an LPN to perform CNA duties. Whether because the census drops to 40 or less, or because a CNA calls off, the Employer judges it necessary on these occasions for the LPN to do the work of a CNA, illustrating that such work differs significantly from the LPN's functions. Yet the CNAs do not perform the principal functions of LPNs when the latter are absent.

The significant wage gap between LPNs and CNAs further supports a finding that a nonprofessional unit excluding LPNs is appropriate. The Board has found smaller disparities sufficient to support a similar conclusion.<sup>53</sup>

I recognize that, as the Employer argues, LPNs and CNAs are hourly paid, have the same benefit package, share the same break room and bulletin board, and are subject to the same personnel policies, as set forth in the Handbook.<sup>54</sup> Nonetheless, the Board has found these factors outweighed by factors supporting the exclusion of LPNs from a unit of CNAs.<sup>55</sup>

I also recognize that, as the Employer points out, LPNs and CNAs perform some of the same duties, such as helping residents with feeding, dressing, bathing, toileting, and transferring.<sup>56</sup> The Board has found such "overlapping

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<sup>53</sup> Lincoln Park Nursing Home, 318 NLRB at 1162 (finding wage gap supports excluding LPNs where LPNs earn \$14 to \$18 per hour and CNAs start at \$8.75 per hour); Hillhaven Convalescent Center, 318 NLRB at 1018-1019 (same where LPNs earn \$10 per hour and CNAs earn \$5.50 per hour).

<sup>54</sup> As explained above, the Handbook sets forth numerous policies governing LPNs and CNAs. However, the Handbook also covers all other employees, as well as statutory supervisors, and is of less weight in determining whether CNAs share a community of interest apart from LPNs. See Pomona Golden Age Convalescent Home, 265 NLRB 1313 (1982) (reversing regional director and finding appropriate petitioned-for unit of employees from one of employer's nine convalescent homes, despite handbook covering personnel policies for all employees at all nine facilities).

<sup>55</sup> Hillhaven Convalescent Center, 318 NLRB at 1018 fn 5.

<sup>56</sup> In this regard, I note that according to the position descriptions, the essential functions of the CNA include functions referred to as assisting with resident comforts, and food service functions, in addition to nursing functions. The position description of the LPN does not contain such functions, and consists mainly of nursing functions.

functions”<sup>57</sup> outweighed by other factors supporting finding appropriate a unit of nonprofessionals excluding LPNs.<sup>58</sup>

The examples of interchange on the record do not establish that LPNs and CNAs share such a strong community of interest as to require including them in one unit. First, as mentioned, CNAs do not work as LPNs. Moreover, the record contains eight examples of an LPN working as a CNA for some or all of a shift over a period of 45 days (November 18, 2009, to January 12, 2010). Given three shifts per day, this means that an LPN temporarily worked as a CNA on six per cent of the shifts (eight out of 135). This is insufficient to require inclusion of LPNs in the unit.<sup>59</sup>

The Employer cites Upstate Homes for Children, 309 NLRB 986 (1992), and Brattleboro Retreat, 310 NLRB 615 (1993). In Upstate Homes for Children, however, the union sought to represent only a portion of the technical employees (the LPNs), and a separate unit of professionals (RNs). In finding that an LPN unit was not appropriate, the Board relied on the contact and common supervision among LPNs, RNs, and other professional and technical employees not included in either of the petitioned-for units. This is clearly not analogous to

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<sup>57</sup> Hillhaven Convalescent Center, 318 NLRB at 1018.

<sup>58</sup> Hillhaven Convalescent Center, 318 NLRB at 1018-1019. See also, Pine Manor Care Nursing Home, 238 NLRB 1654 (1978) (pre-rulemaking case finding appropriate a unit limited to LPNs despite evidence LPNs often assisted nurse aides in performing their duties).

<sup>59</sup> Doubleday & Co., 165 NLRB 325, 326 (1967) (interchange of one to three or four employees every three or four weeks insufficient to require combining composing group employees with petitioned-for unit of bindery and shipping departments); Chin Industries, Inc., 232 NLRB 176, 177 (1977) (sporadic interchange between petitioned-for plant employees and branch stores and occasional substitution of plant employees for branch drivers insufficient to require inclusion of branch employees and drivers).



the instant case, in that the Union is not seeking to represent only a portion of the technical employees.<sup>60</sup>

In Brattleboro Retreat, the Board found the petitioned-for unit of technical employees to be inappropriate at the employer's combination psychiatric hospital/nursing home. Similar to here, all nonprofessionals shared many common personnel policies, benefits, and working conditions, and technical employees had significant work-related contact with nonprofessionals, and shared common supervision with nonprofessionals. However, in Brattleboro Retreat, unlike here, the wage differentials between technical employees and nonprofessionals were fairly small, and technical employees shared wage classifications with many nontechnical, nonprofessional employees. Also, many technical employees were only required to have a high school education. By contrast, here LPNs start at \$18 per hour, 180 per cent of the starting rate for CNAs.<sup>61</sup> Also, there is no evidence that LPNs share wage classifications with any nonprofessionals, and LPNs must all possess a Florida license in addition to a high school education and completion of a one-year LPN course of study.

The Employer also argues that CNAs share a closer community of interest with LPNs than they do with other nonprofessional positions that the Union seeks to include: CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant.<sup>62</sup>

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<sup>60</sup> See Hillhaven Convalescent Center, 318 NLRB at 1019.

<sup>61</sup> There is also no evidence that the large gap between LPN and CNA starting wage rates becomes compressed with tenure.

<sup>62</sup> As stated earlier, the Employer's brief states that the Union seeks to include maintenance employees but the record shows that this is not the case.

The Board has held that “the test for determining whether a dual-function employee should be included in a unit is ‘whether the employee [performs unit work] for sufficient periods of time to demonstrate that he ... has a substantial interest in the unit’s wages, hours, and conditions of employment.’” Air Liquide America Corp., 324 NLRB 661, 662 (1997) (citing Berea Publishing Co., 140 NLRB 516, 518-519 (1963)).

The record does not reflect any job duties of the CNA restorative aide, CNA/central supply clerk and CNA/activity assistant that they do not share with other CNAs. The Employer clearly considers the employees holding each of these positions to be CNAs, as it lists them as such on its roster and the Employer agrees that they belong in a unit of nonprofessionals. It appears from the record that the CNA /restorative aide, CNA/central supply clerk, and CNA/activity assistant are paid as CNAs, and that CNA duties comprise a significant portion of their overall duties. These positions therefore belong in the unit, as the parties agree.<sup>63</sup>

Based upon the foregoing and the record as a whole, I conclude that the CNAs, CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant comprise an appropriate unit, and that an appropriate unit need not include LPNs.<sup>64</sup> See Hillhaven Convalescent Hospital, 318 NLRB 1017 (1995); Lincoln Park Nursing Home, 318 NLRB 1160 (1995); see also, Cogburn

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<sup>63</sup> See Young Broadcasting of Los Angeles, d/b/a KCAL-TV, 331 NLRB 323 (2000) (holding that pursuant to Berea Publishing Co., 140 NLRB 516 (1963), employee who spends 60 per cent of her time as weekday associate producer and 40 per cent as weekend show producer belongs in unit of show producers notwithstanding also belonging to unit of newsroom employees by virtue of her work as weekday producer).

<sup>64</sup> Pool CNAs are eligible if they averaged four hours or more per week during the calendar quarter preceding the eligibility date. Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

Healthcare Center, 335 NLRB 1397, 1423 (2001); Madeira Nursing Center, 203 NLRB 323 (1973).

As explained earlier, the Employer contends that the activity assistant belongs in the unit, while it is not clear from the record whether the Union seeks to include this position, or what duties it has apart from those of CNAs. Given its title, it appears that the activity assistant shares at least some common terms and conditions with the petitioned-for positions, such as the CNA/activity assistant. Moreover, exclusion of the activity assistant could render it difficult for employees in this position to obtain representation under the Act, as this would be the only unrepresented nonprofessional position.<sup>65</sup> For the foregoing reasons, I conclude that the activity assistant may vote subject to challenge.<sup>66</sup>

### **3. CONCLUSIONS AND FINDINGS**

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

C. The Union claims to represent certain employees of the Employer.

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<sup>65</sup> Elliott Precision Block Co., 218 NLRB 141, 142 (1975) (ordering inclusion in unit of employee who, if excluded, might become the only unrepresented employee and thus be denied the opportunity to be represented in collective bargaining).

<sup>66</sup> See Hillhaven Convalescent Center, 318 NLRB at 1019 (permitting disputed position of physical therapy assistant to vote under challenge because record was "too sparse as to his duties and responsibilities to make a judgment.")

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

E. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nursing assistants, CNA/restorative aides, CNA/central supply clerks, and CNA/activity assistants employed by the Employer at its St. Petersburg, Florida facility, excluding all other employees, registered nurses, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.<sup>67</sup>

### **Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Food and Commercial Workers International Union, Local 1625. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or

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<sup>67</sup> The activity assistant who does not have "CNA" as part of her job title may vote subject to challenge.

temporarily laid off.<sup>68</sup> Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon

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<sup>68</sup> Pool CNAs are eligible if they averaged four hours or more per week during the calendar quarter preceding the eligibility date. Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **March 19, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the list will be made available to all parties to the election, please furnish two copies of the list.<sup>69</sup>

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notice of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops an employer from filing objections based on nonposting of the Election Notice.

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<sup>69</sup> The list may be submitted by facsimile transmission to (813) 228-2874, or electronically, as well as by hard copy. See [www.nlr.gov](http://www.nlr.gov) for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

### **Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570-0001. This request must be received by **March 26, 2010**. The request may not be filed by facsimile, but may be filed electronically.<sup>70</sup>

DATED at Tampa, Florida this 12<sup>th</sup> day of March, 2010.

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Rochelle Kentov, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Boulevard, Suite 530  
Tampa, Florida 33602

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<sup>70</sup> See [www.nlrb.gov](http://www.nlrb.gov) for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.